No. 47573-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

RONALD GLENN DAUGHERTY,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 13-1-05005-8
The Honorable John Hickman, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by granting the State's motion to admit prior bad act testimony that should have been excluded under ER 404(b).

2. The trial court erred by finding that the dissimilar allegations of abuse committed against A.F. were admissible under ER 404(b) to show a common scheme or plan.

3. The trial court erred when it denied Ronald Daugherty's motion for a mistrial.

4. Ronald Daugherty was denied a fair trial when a State's witness violated the court's instruction not to mention that Ronald had been in prison.

5. The trial court erred by granting the State's motion to allow its expert to testify that it is common for alleged victims of child rape to delay disclosure.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court commit reversible error when it admitted A.F.'s testimony describing prior sexual misconduct as evidence of a common scheme or plan, where there was no evidence of a scheme or plan and where the allegations were dissimilar to the charged conduct? (Assignments of

Error 1 & 2)

2. Did the trial court deny Ronald Daugherty a fair trial when it denied his motion for a mistrial, after a witness who was called to testify regarding prior sexual misconduct told the jury that Ronald had been in prison, in direct violation of the court's order excluding this fact and its specific instruction to the witness not to mention this fact? (Assignments of Error 3 & 4)

3. Did the trial court commit reversible error when it allowed the child interviewer to testify in detail about why alleged victims of child rape delay disclosure, where the evidence was unnecessary because the alleged victim testified about her reasons for not immediately disclosing and where the expert's testimony did nothing more than improperly bolster the credibility of the alleged victim? (Assignment of Error 5)

III. STATEMENT OF THE CASE

A. RELEVANT PROCEDURAL HISTORY

The State charged Ronald Glenn Daugherty with four counts of rape of a child in the second degree (RCW 9A.44.076). (CP 1-3) The State alleged that, between August of 2012 and December of 2013, Ronald engaged in sexual intercourse with H.H., his step-

granddaughter, when she was 12 to 13 years old. (CP 1-3)

Ronald was found guilty in 1996 of two counts of child molestation in the first degree committed against his daughter, A.F. (CP 36) Before the current trial, the prosecutor sought permission under ER 404(b) to call A.F. to testify about those incidents. (CP 36-50; RP 175-79) Ronald vigorously objected, but the trial court admitted the testimony after finding that it was relevant to show a common scheme or plan. (CP 7-35, 119-25; RP 186-91, 200-07) However, the trial court ruled that neither A.F. nor any other witness could mention that Ronald was previously convicted of a crime or served time in prison as a result of A.F.'s allegations. (RP 287, 392-93)

Over Ronald's objection, the State was also allowed to elicit testimony from the child forensic interviewer about the topic of delayed disclosure by sex abuse victims. (CP 75-77; RP 379-83) The trial court denied Ronald's request to introduce the content of sexually explicit text messages found on H.H.'s iPod, which could have shown another source for H.H.'s mature sexual knowledge. (CP 78-85; RP 360-61) The trial court also denied Ronald's motion for a mistrial after A.F. testified in violation of the court's in limine ruling that no witness should mention that Ronald had been in

prison. (RP 1711-22)

The jury convicted Ronald of three of the four counts charged in the Information. (CP 173-76; RP 2196-97) After finding that Ronald is a persistent offender, the trial court sentenced him to a life sentence without the possibility of release. (CP 191, 199-202; RP 2216) This appeal timely follows. (CP 204)

B. SUBSTANTIVE FACTS

When A.F. was about six years old, she lived with her father, Ronald Daugherty, her brother Donald, her two half-brothers, and her stepmother.[1] (RP 1673-74, 1675) She remembers several occasions where her father touched her genital area when they were alone together. (RP 1674-75, 1676-77) But she did not tell her brother or her stepmother. (RP 1677)

After Ronald and his wife separated, A.F. and Donald went to live with their grandparents in California. (RP 1678) According to A.F., she was then molested by her uncle. (RP 1678-79) She told her grandmother, but her grandmother did not believe her. (RP 1679)

[1] A.F. was 30 years old at the time of trial, but will be referred to by her initials out of respect for her privacy. (RP 1670) Additionally, a number of parties in this case share a last name. To avoid confusion, they will be referred to by their first names.

When A.F. was eight years old, she and Donald moved back to Washington to live with their father. (RP 1680) When she was nine years old, Ronald married a woman named Laura, and the family moved into her home. (RP 1687, 1692) According to A.F., Ronald molested her repeatedly during these years by fondling her genital area, penetrating her vagina with his finger, and rubbing his penis on her leg. (RP 1681-83, 1687-88, 1689) He also showed her magazine photographs of naked adults, and on one occasion used the side of an electric razor against her genitals to stimulate her. (RP 1683, 1690-91) Ronald told A.F. not to tell anyone because he would get in trouble and their family would be split apart. (RP 1694)

Hoping to put a stop to the molestation, A.F. told Laura what Ronald was doing. (RP 1695-96) Laura tried to be supportive by confronting Ronald and by arranging counseling for A.F. with a pastor, but A.F. felt that Laura did not believe her, and the molestation continued. (RP 1696-97, 1698-99, 1700) The molestation stopped in 1996, when A.F. was 12 years old, because she no longer lived with Ronald. (RP 1702)

In August of 2012, Donald moved from Ohio to Washington with his wife Amanda and his children, including his 12 year old

stepdaughter H.H. (RP 443-44, 445, 739-40, 746, 1012, 1014-15, 1016-17) Ronald and Laura agreed to let Donald's family live with them in their house until they were financially independent. (RP 446, 746, 1023, 1025) Although Donald and Amanda were aware of A.F.'s allegations, they were not overly concerned that their children could be at risk. (RP 756-57, 1052-53, 1069-70) But Amanda still warned H.H. to be careful, and to tell Amanda if Ronald tried to touch her. (RP 867-68) The family lived with Ronald and Laura for about a year, moving out in July of 2013. (RP 817-18, 1023)

During that year, H.H. became involved in a church youth group. (RP 809) Although H.H. was forbidden from dating, her parents discovered that she had been exchanging sexually explicit text messages with another boy in the group. (RP 455, 509-10, 811) H.H. was disciplined and lost her texting privileges. (RP 508, 814) But, unbeknownst to her parents, she still communicated with boys using a texting application she downloaded onto Ronald's tablet computer. (RP 487, 488-89, 502, 514-15, 815-16, 1976-77)

H.H. received an iPod for Christmas in December of 2012, and took it with her on a trip to Ohio the following summer. (RP 500-01, 508, 820, 821) A series of sexually explicit texts sent to

and from H.H.'s iPod while she was in Ohio showed up on Ronald's tablet after he opened the texting application. (RP 488-89, 502, 1976-77) H.H. claimed those texts were sent by her friend Lilly. (RP 687, 840)

H.H. also claimed that Ronald molested her repeatedly during the year she lived with Ronald and Laura. (RP 463, 468) H.H. testified that the first incident occurred after she lost money playing cards with him, and he allowed her to repay her "debt" by "fooling around." (RP 466-67) He French kissed her and touched her breast with his hand. (RP 468)

A few months later, when H.H. was helping Ronald in his woodshop, Ronald approached H.H. again and convinced her to give him a "hand job" by stroking his penis with her hand, and a "blow job" by placing his penis in her mouth.[2] (RP 480, 481-83) H.H. testified that Ronald molested her another time in his woodshop by touching her genitals and putting his finger in her vagina. (RP 493-94, 496-97) She also gave Ronald another "hand job" and another "blow job."[3] (RP 495)

The activity continued after H.H.'s family moved out. (RP

[2] This incident formed the basis for count 1. (RP 2104, 2110)
[3] This incident formed the basis for count 2. (RP 2104, 2110)

519, 520-21, 523-24) H.H. testified that Ronald showed her a pornographic video of two people engaging in a sex act, so that H.H. could "do it right." (RP 536) Another time, when H.H. visited Ronald and Laura, she and Ronald went into his bedroom where they engaged in anal intercourse.[4] (RP 525-27) And another time, when H.H. and Ronald went to an elderly friend's home to help with housework, Ronald touched H.H.'s breast and put his finger into her vagina while they did laundry in the basement.[5] (RP 529, 531-32, 1636, 1641)

H.H. testified that she did not tell anyone about Ronald's behavior because she was afraid that it would upset her family and make everyone unhappy. (RP 470-72) She also testified that Ronald knew that she was breaking the rules about dating and texting with boys, and told her he would keep her secrets if she kept "fooling around" with him. (RP 486, 487, 489, 490) H.H. felt that he was "protecting" her. (RP 511)

But on Christmas day of 2013, H.H. decided she had enough and told her uncle, Sean Daugherty, what had been going on between her and Ronald. (RP 539, 540-41, 1474, 1481) When

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[4] This incident formed the basis for count 3. (RP 2104, 2112) The jury found Ronald not guilty of this count. (RP 2196-97; CP 175)
[5] This incident formed the basis for count 4. (RP 2104, 2112-13)

Sean and Donald confronted Ronald later that night, Ronald seemed shocked and upset. (RP 1144, 1496)

Ronald's wife Laura Daugherty testified that she and Ronald were concerned when Donald's family wanted to live with them. (RP 1814-15) Laura and Ronald specifically told Donald and Amanda that Ronald did not want to be alone with their children because he did not want to be falsely accused of molesting another child. (RP 1812-13, 1815, 1916-17) Laura testified that Amanda chafed at the rules she and Ronald put in place for the children while they lived in her home. (RP 1827-28, 1830) Laura and Ronald were concerned with H.H.'s behavior and the inappropriate texting, but Amanda and Donald were not receptive to their input. (RP 1828, 1838, 1851-52, 1956, 1974)

Laura and Ronald both testified that Ronald has had difficulty achieving and keeping an erection since 2011 due to medications he takes for various medical conditions. (RP 1873, 2018, 2021-22)

Ronald also testified that he confronted H.H. about the inappropriate texts. H.H. became angry, told Ronald that she knew about A.F.'s accusations, and all she had to do was tell her parents that Ronald touched her and he would be in trouble. (RP 1963,

1974) This concerned Ronald, and he decided he should live somewhere else until Donald's family moved out, but Laura convinced him to stay. (RP 1975)

H.H.'s secretive behavior did not end, and Ronald found more sexually explicit texts and a Facebook account on his computer that H.H. had set up and hidden from her parents. (RP 1976-77, 1992-93, 2000-01) Finally, on Christmas day of 2013, Ronald confronted H.H. about her activities and about behavior that day that he found disrespectful to the rest of the family. (RP 2001-03, 2005, 2006) H.H. became angry, and told Ronald to stop "stalking" her. (RP 2007) Later that day, H.H. shared her allegations with Sean. (RP 2009) Ronald was shocked when they confronted him, and he tried to tell them about his argument with H.H., about the threat she had made against him, and about her texting activities. (RP 2011-13)

The State did not present any physical evidence to corroborate H.H.'s allegations, and H.H. refused to undergo a physical examination that might have confirmed her claims. (RP 641) Ronald denied ever touching H.H. in a sexual manner. (RP 1987, 2023-24)

IV. ARGUMENT & AUTHORITIES

A. THE TRIAL COURT SHOULD HAVE EXCLUDED A.F.'S TESTIMONY REGARDING RONALD'S PRIOR SEXUAL MISCONDUCT BECAUSE IT DID NOT SHOW A COMMON SCHEME OR PLAN AND IT WAS OVERLY PREJUDICIAL.

A defendant must only be tried for those offenses actually charged. Therefore, evidence of other crimes must be excluded unless shown to be relevant to a material issue and to be more probative than prejudicial. State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984); State v. Goebel, 40 Wn.2d 18, 21, 240 P.2d 251 (1952).

The State sought to introduce evidence regarding Daugherty's prior sexual misconduct with A.F. to show a common scheme or plan under ER 404(b). (RP 175-79; CP 36-50) That rule provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b). Daugherty objected to its admission because the evidence was not sufficiently similar and was more prejudicial than probative. (RP 180-87; CP 55-64)

The trial court chose to ignore all of the differences between A.F.'s and H.H.'s allegations, and found sufficient proof of a common scheme or plan, stating:

> The differences in the sexual acts performed are consistent in that he did the type of sexual acts with each child that was relative to their ages.... Further, this was just not a one- or two-time abuse incident with each child. It was continuous and graduated into more serious abuse as time went on. In short, both cases -- in both cases it was constant until he was removed or discovered.
>
> These alleged victims were both in a relationship of trust with the defendant: One his daughter, the other his step-granddaughter. These were not isolated strangers. It's hard to betray a person you trust, love and don't want to harm. Defendant knew this and used it as a tool for A.F. Most of the incidents for H.H. happened when she was left alone with him at his home, the same location used for A.F. But like A.F., abuse also took place outside of the home.
>
> There are differences as to the nature of the abuse. For A.F., there was magazines allegedly used for stimulation; H.H., porno films. Sexual contact for A.F. was mainly fondling and rubbing. H.H. was oral sex and intercourse. The differences in the ages: Eight years old for A.F., 13 plus for H.H. A.F.'s manipulation by her father was used by guilt. For H.H., it was the threat of exposure against H.H. of alleged wrongdoing that she had done.
>
> These alleged victims are not random friends or strangers. They are close relations, which gave him a unique advantage in his sexually abusive behavior. The common goal was to satisfy his sexual desires with those he was closest to, his daughter and granddaughter by marriage. The differences noted above are really differences -- are not really differences, as much as increasing the level of sexual

abuse to correspond with the child's age.

(RP 204-05; CP 119-25)

A trial court's decision to admit or exclude evidence under ER 404(b) is reviewed for an abuse of discretion. State v. Tharp, 27 Wn. App. 198, 205-06, 616 P.2d 693 (1980). A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). The trial court abused its discretion in this case because there was no common scheme or plan.

Although ER 404(b) allows the admission of evidence of a common scheme or plan, this is not an exception to the ban on propensity evidence. State v. Gresham, 173 Wn.2d 405, 429, 269 P.3d 207 (2012). "Even when evidence of a person's prior misconduct is admissible for a proper purpose under ER 404(b), it remains inadmissible for the purpose of demonstrating the person's character and action in conformity with that character." Gresham, 173 Wn.2d at 429.

Thus, before evidence can be admitted under ER 404(b) for the purpose of proving a common scheme or plan, it must satisfy three requirements: the prior acts must be (1) proved by a

preponderance of the evidence, (2) relevant to prove an element of the crime charged or to rebut a defense, and (3) more probative than prejudicial. State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). The State's burden to demonstrate admissibility is "substantial." State v. DeVincentis, 150 Wn.2d 11, 17, 20, 74 P.3d 119 (2003).

"Careful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest." State v. Coe, 101 Wn.2d at 780-81. And in "doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence." State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 772 (1983).

1. *A.F.'s testimony is not relevant because it is dissimilar to H.H.'s allegation and therefore does not demonstrate a common scheme or plan.*

To prove a common scheme or plan, the other crime evidence must demonstrate "that the person 'committed markedly similar acts of misconduct against similar victims under similar circumstances.'" State v. Carleton, 82 Wn. App. 680, 683, 919 P.2d 128 (1996) (quoting Lough, 125 Wn.2d at 852). Stated another way, the "'prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that

the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.'" Carleton, 82 Wn. App. at 684 (quoting Lough, 125 Wn.2d at 860).

The Washington Supreme Court has recognized two types of evidence of a common scheme or plan admissible under ER 404(b):

> The first type involves multiple crimes that constitute parts of a larger, overarching criminal plan in which the prior acts are causally related to the crime charged. An example of this type is a prior theft of a tool or weapon, which is used to perpetrate the subsequent charged crime, such as a burglary. . . . a second type of common scheme or plan . . . involves prior acts as evidence of a single plan used repeatedly to commit separate, but very similar, crimes.

DeVincentis, 150 Wn.2d at 19. To show the second type of "plan," the "degree of similarity" between the prior bad acts and the charged crimes "must be substantial." DeVincentis, 150 Wn.2d at 20.

For example, in DeVincentis, the court noted that the proposed evidence showed "that the defendant had devised a scheme to get to know young people through a safe channel, such as a friend of his daughter, or . . . as a friend of the next-door

neighbor girl" and used that familiarity to lure the children into an isolated environment in which he proceeded to groom them by wearing almost no clothes in front of them and by asking for massages. 150 Wn.2d at 22. The conclusion of this scheme was the actual criminal behavior—sexual contact. 150 Wn.2d at 22. The trial court in that case very carefully analyzed the similarity of the prior bad act evidence and excluded some of the acts, finding them dissimilar. 150 Wn.2d at 23.

In State v. Sexsmith, the defendant began touching his girlfriend's daughter, C.H., when she was 11 years old. 138 Wn. App. 497, 502, 157 P.3d 901 (2007). He had C.H. watch pornographic videos with him, forced her to touch his penis, took numerous nude photographs of C.H. and also made numerous videotapes of C.H. and him having intercourse. He also made her perform oral sex on him. Many of these offenses occurred in the basement of Sexsmith's mother's home. 138 Wn. App. at 502. His biological daughter A.S. was permitted to testify that Sexsmith similarly forced her to watch pornographic videos with him and forced her to touch his penis. She also testified he forced her to pose for nude photographs, and that many of these instances occurred in the basement of Sexsmith's mother's home. 138 Wn.

App. at 503. Though the abuse against C.H. was more extensive than against his daughter A.S., what made the two events substantially similar is that Sexsmith liked to take nude photographs of his victims, he forced them to watch pornographic videos, committed these acts in the basement of his mother's house, and forced each victim to touch his penis. 138 Wn. App. at 505.

And in State v. Williams, the defendant was charged with two counts of first degree rape and assault with sexual motivation for victimizing two different women. 156 Wn. App. 482, 487, 234 P.3d 1174 (2010). In each instance, the defendant chose someone he found wandering the streets or someone homeless. After promising drugs or alcohol, and when he was alone with the women, he attacked them by strangling them into unconsciousness. He then raped them repeatedly. 156 Wn. App. at 488. The trial court admitted prior sexual assault against a previous victim whose description of the attack almost mirrored the attacks on the defendant's two current victims. During his prior sexual assault, the victim testified that the defendant offered her marijuana, grabbed her from behind, and strangled her to unconsciousness while he raped her repeatedly. 156 Wn. App. at 489. It was clear to the court that the defendant had devised a plan

which he used repeatedly to perpetuate his crime. 156 Wn. App. at 491.

In contrast, A.F.'s and H.H.'s allegations do not describe any general plan or scheme, and the differences far outweigh the similarities. While both claimed that Ronald touched their genital area, only H.H. claimed that Ronald made her rub his penis and perform oral and anal sex. (RP 128-29; 482, 494, 495, 527, 532) While both claimed that Ronald showed them pornography, the depictions (two adults versus an adult and child) and the medium (still photograph versus video recording) were quite different. (RP 129, 535-36) However, the acts did not occur repeatedly under similar circumstances or in the same location. And there was no testimony that Ronald used a particular method to get the girls alone. In fact, H.H. frequently and voluntarily placed herself in situations where she was alone with Ronald in his wood shop. (RP 479-80, 494, 531, 635)

The few similarities that do exist, and which the trial court relied upon, are not distinctive or unusual. It is very common that the perpetrator of sexual abuse is a member of the victim's family. (RP 1192-93) And because of this familial relationship, the perpetrator is able to gain the trust of the victim and other family

members and is able to abuse his position of trust to victimize the children. To say a familial relationship between the child and the perpetrator is somehow distinctive or unique or something different than in other types of child molestation cases is unreasonable and defies common sense.

Likewise, there is nothing unusual about a perpetrator telling his victim not to disclose the abuse. There is nothing distinctive or unique or different about the fact that Ronald allegedly told A.F. and H.H. not to tell. More importantly, there is nothing substantially similar about what he told A.F. to get her not to tell (that he would get in trouble and the family would be split up) and what he told H.H. to get her not to tell (that her parents would learn about her inappropriate texting and use of social media). (RP 486, 490, 608, 1694)

While there may be superficial similarities between Ronald's prior conduct and the charged crimes, the similarities are not substantial enough to become relevant as a common scheme or single plan rather than merely propensity evidence. The prior conduct evidence provided by A.F. in this case simply does not bare an adequate degree of similarity. Consequently, it was an abuse of discretion for the trial court to admit A.F.'s testimony under

ER 404(b).

2. *The prejudicial nature of the highly inflammatory testimony outweighs its relevance and is therefore inadmissible under ER 404(b) and ER 403.*

Prior bad act evidence can be admitted only where "its probative value clearly outweighs its prejudicial effect." Lough, 125 Wn.2d at 862; ER 403. It is clear under the circumstances of this case, that the prejudice of A.F.'s testimony did outweigh its probative value.

DeVincentis notes several relevant considerations to consider in making this determination, such as the age of the victim, the need for the evidence, the absence of physical proof, and the absence of corroborating evidence. 150 Wn.2d at 23. In this case, H.H. was old enough to competently testify on her own behalf, so the necessity of the additional testimony was low.

The probative value of A.F.'s testimony must be weighed against the prejudicial impact of the evidence. The Supreme Court's decision in Lough is instructive on this point. In Lough, the defendant was charged with drugging and then raping his victim while she was unconscious. The State attempted to introduce evidence from four other women that, over a ten-year period, Lough had raped them in a similar manner. The trial court allowed the

women's testimony as evidence of a common scheme or plan to drug and rape women. Lough, 125 Wn.2d at 849-50.

On appeal, the Supreme Court considered three factors in deciding that the probative value of the testimony clearly outweighed its prejudicial effect. These factors were subsequently discussed in State v. Krause, 82 Wn. App. 688, 919 P.2d 123 (1996).

First, the court found the evidence highly probative because it showed the same design or plan on a number of occasions. Krause, 82 Wn. App. at 696. But there are few similarities between A.F.'s and H.H.'s stories that would increase the probative value of A.F.'s prior conduct testimony.

The second factor identified by the Lough court was the need for the ER 404(b) testimony because the victim was drugged during the attack and not entirely capable of testifying to the defendant's actions. Lough, 125 Wn.2d at 859. Only by hearing from all of the witnesses would a clear picture of events emerge. Krause, 82 Wn. App. at 696. Again, this is not true in Daugherty's case. H.H. was 12 to 13 years old at the time of the alleged incident and 14 years old at trial and therefore fully able to testify for herself. (RP 436, 445) *Compare* State v. Kennealy, 151 Wn.

App. 861, 890, 214 P.3d 200 (2009) (noting that the young age of alleged victims when they testified supported admission).

The third factor identified in Lough was the repeated use of a limiting instruction. However, even with the instruction, "[c]ourts have often held that the inference of predisposition is too prejudicial and too powerful to be contained by a limiting instruction." Krause, 82 Wn. App. at 696 (and cases cited therein).

Thus, the inapplicability of the Lough factors shows that A.F.'s testimony was not more probative than prejudicial, and therefore should not have been admitted under ER 403 and ER 404(b).

The erroneous admission of this testimony is not harmless. In closing arguments, the State relied heavily on A.F.'s testimony to argue that Ronald also committed the crimes against H.H. (RP 2132-34) And, as the Washington Supreme Court has recognized, "[o]nce the accused has been characterized as a person of abnormal bent, driven by biological inclination, it seems relatively easy to arrive at the conclusion that he must be guilty, he could not help but be otherwise." State v. Saltarelli, 98 Wn.2d 358, 363, 655 P.2d 697 (1982) (citations omitted). Accordingly, Ronald's convictions must be reversed.

B. THE TRIAL COURT SHOULD HAVE DECLARED A MISTRIAL AFTER A.F. TESTIFIED THAT RONALD HAD BEEN IN PRISON AFTER BEING SPECIFICALLY ADMONISHED NOT TO MENTION THAT INADMISSIBLE AND HIGHLY PREJUDICIAL FACT.

Before trial, the court ruled that none of the witnesses should mention that Ronald had prior convictions or had been to prison. (RP 287, 392-93) The court and the prosecutor forcefully admonished each witness not to mention these facts. (RP 417, 432, 743-44, 785, 937-38, 1007-08, 1459-60, 1665-67) Before A.F. testified, the court specifically said to her:

> We're not going to mention that your dad was convicted. We're not going to mention that he went to prison. Basically it's okay to talk about what occurred to you, but whether he was found guilty or not, at least at this stage, or went to prison, that's not relevant.... But we won't say and -- because he went to prison or he ended up in prison. That kind of thing is off limits because we're trying not to let the jury know under any circumstances that he was, in fact, convicted or that he went to prison.

(RP 1665-66) But when A.F. was asked about how she learned Donald and his family were planning to move to Washington, she responded "Donnie had come to visit Washington, and my – I believe my dad was still in prison[.]" (RP 1710-11)

The judge immediately removed the jury from the courtroom, and the defense requested that the court declare a mistrial. (RP 1711-12) Even though the court had gone to such lengths to

ensure that this information be kept out of trial, the court denied the motion, stating:

> I'm going to deny the motion for mistrial for the following reasons. First of all, it's to a collateral issue in terms of whether or not it goes to guilt or innocence in this particular case. It's an issue that we -- the Court did avoid because the Court did feel it would be potentially prejudicial if it was discussed in front of the jury, but I don't think it affects his ability to have a fair trial in this particular case.
>
> The comment itself was in response to a question. I don't believe bad faith was involved. I did not hear anything from the jury that would indicate that they took it differently than any other comment or testimony that's been made during the trial. I also feel that there has been no other person who has also -- like you say, it's not cumulative in that everyone else -- this is the second or third time that someone has violated the court order and made a comment regarding this particular issue.
>
> The fact is that the jury did not hear that it was connected to this case, but that he was simply in prison, and that was a reason why there hadn't been contact.

(RP 1720-21) Then the trial court simply told the jury to disregard A.F.'s answer. (RP 1725-26)

A trial court must grant a mistrial where a trial irregularity may have affected the outcome of the trial, thereby denying an accused the right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). In deciding whether a trial irregularity

had this impact, courts examine (1) its seriousness, (2) whether it involved cumulative evidence, and (3) whether a curative instruction was given capable of curing the irregularity. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994). This Court reviews the denial of a motion for mistrial for an abuse of discretion. Johnson, 124 Wn.2d at 76. An examination of the above criteria reveals the trial court abused its discretion when it denied Ronald's motion for a mistrial after A.F. testified he had been in prison.

First, this error was very serious and therefore weighs in favor of reversal. As discussed above, evidence of "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b). Admission of evidence relating to a defendant's prior criminal conduct impermissibly shifts "'the jury's attention to the defendant's general propensity for criminality, the forbidden inference[.]'" State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (1997) (quoting State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987)); *see also* State v. Hardy, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997) (prior conviction evidence is "very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crimes"). It is well accepted by scholars and courts that the probability of

conviction increases dramatically once the jury becomes aware of prior crimes or convictions. Hardy, 133 Wn.2d at 710-11.

Recognizing that Ronald would be prejudiced if jurors learned he was actually convicted and sent to prison for molesting A.F.—and absent any showing that such evidence was admissible under one of the purposes listed in ER 404(b)—the trial court correctly precluded the State from introducing such testimony. The court ordered the State to carefully prepare its witnesses in order to avoid such testimony. The judge also personally admonished each witness, in no uncertain terms, not to mention that Ronald had been convicted or had served time in prison. The court's attention to this matter indicates it was seriously concerned about the prejudice that would result if the jury learned this fact. Because the irregularity was serious, this Court should find that this factor weighs in favor of reversal.

As for the second factor, the evidence was not cumulative of any properly admitted evidence, and likewise weighs in favor of reversal. The jury heard A.F.'s testimony describing what her father did. But they were still free to give A.F. and her testimony whatever weight and credibility they deemed appropriate. Given the timing of Daugherty's incarceration, as related by A.F., jurors

were likely to infer that he had been convicted of these crimes, and therefore the jurors would assume that A.F. was credible and must be believed.

Furthermore, evidence establishing that an accused previously committed acts similar to the current charge is especially prejudicial because it allows the jury to shift their focus from the merits of the current allegations and instead focus on past behavior. State v. Trickler, 106 Wn. App. 727, 732, 25 P.3d 445 (2001). Not only was the evidence not cumulative, it also suggested the truth of the prior criminal acts against A.F. Again, the second factor also weighs in favor of reversal.

Finally, the court did tell the jurors to disregard the testimony. But some errors simply cannot be fixed with an instruction. State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996); Escalona, 49 Wn. App. at 255-56. Furthermore, given the immediate and lengthy recess that occurred the moment after A.F. spoke the word "prison," the jurors had plenty of time to consider what they had heard and what it might mean. State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968).

Division One's decision in Escalona is instructive here. In that case, the defendant was convicted of second degree assault

with a deadly weapon. 49 Wn. App. at 252. The trial court granted Escalona's motion to exclude reference to the fact that he previously had been convicted of the same crime. 49 Wn. App. at 252. During cross examination, the victim stated that on the day of the stabbing, he was nervous when he saw Escalona because he knew Escalona had a record and had stabbed someone before. Defense counsel moved for a mistrial, but the trial court denied the motion and instructed the jury to disregard the remark. 49 Wn. App. at 253.

The Court of Appeals reversed the conviction, reasoning that (1) the irregularity was extremely serious, (2) it was not cumulative, since the trial court had already ruled that evidence of the prior crime could not be admitted, and (3) the trial court's instruction to the jury could not have cured the prejudice caused by the remark. Escalona, 49 Wn. App. at 255. Regarding the prejudice caused by the statement, the court noted:

> [D]espite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past.

49 Wn. App. at 256. Thus, the court concluded that the trial court

abused its discretion in denying the defense motion for a mistrial. 49 Wn. App. at 256.

On the other hand, in State v. Condon, the Court of Appeals affirmed the trial court's denial of a motion for a mistrial after a witness violated an order in limine by testifying that the defendant, on trial for murder, had previously been in jail. 72 Wn. App. 638, 649-50, 865 P.2d 521 (1993). The Condon court distinguished its facts from those present in Escalona, noting:

> In [Escalona] the improper statements indicated that the defendants had committed crimes similar or identical to the crimes for which they were on trial. Thus, the statements were extremely prejudicial because it was likely that jurors would conclude that the defendant had a propensity for committing that type of crime.
>
> In the present case, on the other hand, the reference to Condon having been in jail was much more ambiguous. The mere fact that someone has been in jail does not indicate a propensity to commit murder, and the jury just as easily could have concluded that Condon was in jail for a minor offense. Also, the fact that someone has been in jail does not necessarily mean that he or she has been convicted of a crime. Thus, although the remarks may have had the potential for prejudice, they were not so serious as to warrant a mistrial, and the court's instructions to disregard the statements were sufficient to alleviate any prejudice that may have resulted.

72 Wn. App. 649-50.

As in Escalona, the improper statement surely indicated that

Ronald had committed the crimes alleged by A.F.—crimes that were sex-related, as were the crimes for which he was on trial. A.F.'s testimony regarding Ronald being in prison seriously undermined any chance he had of attacking A.F.'s credibility, and by extension H.H.'s credibility. Because the erroneous introduction of the evidence was not harmless, this Court should reverse Ronald's convictions and remand for a new trial.

C. THE TRIAL COURT SHOULD HAVE EXCLUDED THE EXPERT TESTIMONY REGARDING DELAYED DISCLOSURE BY SEXUAL ABUSE VICTIMS BECAUSE IT WAS UNNECESSARY AND UNFAIRLY BOLSTERED H.H.'S CREDIBILITY.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702. Once a witness's credibility is in issue, evidence tending to corroborate the testimony may, in the trial court's discretion, be obtained from an expert witness. *See* State v. Froehlich, 96 Wn.2d 301, 307-308, 635 P.2d 127 (1981); *see also* State v. Thacker, 94 Wn.2d 276, 616 P.2d 655 (1980). The trial court's decision is reviewed for abuse of discretion. State v. Petrich, 101 Wn.2d 566, 575, 683 P.2d 173 (1984).

The initial determination to allow expert testimony requires the trial court to find that the testimony presents information likely to help the jury understand the evidence. *See* ER 702; Swartley v. Seattle Sch. Dist. 1, 70 Wn.2d 17, 421 P.2d 1009 (1966). The trial court must evaluate both the relevance of the testimony and its prejudicial impact, excluding unnecessarily cumulative or unfairly prejudicial testimony. *See* ER 402, 403. Over defense objection, the trial court allowed the State to call child interviewer Patricia Mahaulu-Stephens to testify in detail regarding how and why child victims commonly delay reporting sexual abuse. (CP 75-77; RP 379-83)

Mahaulu-Stephens testified that children often do not report abuse immediately after it occurs, and instead wait until they feel it is a safe time to tell. (RP 1188) She explained that children often delay reporting if doing so would impact their living arrangements, would hurt other loved ones, or if they are threatened. (RP 1192-93) Mahaulu-Stephens also testified that children often disclose bit by bit, sharing additional details or events as they become more comfortable talking about it. (RP 1189-90) It is also common for a child to have trouble remembering all of the details at once, and for additional details to emerge later. (RP 1195, 1197-98) It is

common for adolescents to disclose when they have something to gain, and for adolescents to first disclose to someone they are not especially close to. (RP 1190-91, 1194)

It was an abuse of discretion to allow Mahaulu-Stephens's testimony because: (1) the testimony was not necessary and (2) the testimony unduly bolstered H.H.'s credibility.[6]

H.H. testified that she did not immediately disclose because her family was happy in Washington and she was scared the family would not be happy anymore and it would be her fault. (RP 470-72) She also testified that, as things progressed, she did not disclose because Ronald knew she had broken her parents' rules about dating and texting boys, and he threatened to tell them if she did not continue their sexual relationship. (RP 486, 490) She also felt that he helped protect her from being punished on those occasions when H.H.'s misbehavior was discovered by her parents. (RP 511, 608) H.H. testified that she finally decided to tell Sean because she was tired of Ronald "stalking" her through her texts and social media, and she wanted the molestation to stop. (RP 539, 540-41, 681, 682-83) All of these reasons given by H.H. to

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[6] *See* State v. Smith, 67 Wn. App. 838, 844, 841 P.2d 76 (1992) (State cannot bolster the credibility of its critical witness).

explain why she delayed reporting the abuse and why she finally chose to disclose to Sean on Christmas day are clear and easy for any juror to understand without the aid of an expert. Mahaulu-Stephens's testimony was simply not needed to "assist the trier of fact to understand" H.H.'s delayed disclosure.

The admission of the testimony was prejudicial because it bolstered H.H.'s credibility in a case where credibility meant everything.[7] The reasons Mahaulu-Stephens gave for why a child will delay disclosure, and the methods by which a child will finally disclose, closely mirrored the reasons given by H.H. in her testimony. Mahaulu-Stephens was essentially vouching for H.H. and telling the jury that everything H.H. testified to was believable. Because the jury's determination of guilt or innocence rested on its opinion of H.H.'s credibility, it is impossible to say that the jury would have necessarily found her testimony credible if it had not been improperly bolstered by this expert testimony. Accordingly, this error also requires that Ronald's convictions be reversed.

[7] The prosecutor acknowledged in closing statements that "[t]his case is about credibility." (RP 2105)

D. CUMULATIVE ERROR DENIED RONALD A FAIR TRIAL.

An accumulation of non-reversible errors may deny a defendant a fair trial. State v. Perrett, 86 Wn. App. at 322. Where it appears reasonably probable that the cumulative effect of the trial errors materially effected the outcome of the trial, reversal is required. State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).

As argued in detail above, each of the trial court's errors—admitting A.F.'s testimony relating prior sexual misconduct, failing to declare a mistrial after A.F. testified that Ronald had been in prison, and admitting testimony regarding delayed disclosure—severely prejudiced Ronald's right to a fair trial and materially effected the outcome of the trial. But if any one of the above issues standing alone does not warrant reversal of Ronald's convictions, the cumulative effect of these errors certainly requires reversal. *See* Perrett, 86 Wn. App. at 322-23 (and cases cited therein).

V. CONCLUSION

Admission of the highly prejudicial testimony of A.F. describing prior sexual misconduct was not sufficiently similar to H.H.'s allegations, and did not show a common scheme or single plan. And A.F's statement that Ronald had been in prison, made

directly after she described his sexual misconduct, was highly prejudicial and could not have been cured by the court's instruction to disregard that fact. Finally, because H.H. gave numerous reasons why she delayed disclosure, the expert testimony regarding delayed disclosure did not assist the trier of fact in understanding the evidence or determining a fact in issue, and the testimony did nothing more than improperly bolster H.H.'s credibility—the key to the entire case. Each of the trial courts errors alone denied Ronald a fair trial, but the cumulative prejudice of the errors cannot be denied and Ronald's convictions must be reversed.

DATED: February 10, 2016

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CERTIFICATE OF MAILING

I certify that on 02/10/2016, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Ronald Glenn Daugherty, DOC# 757311, Washington State Penitentiary, 1313 N 13th Ave., Walla Walla, WA 99362.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

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